Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,
Petitioner,

v.

CHRYSLER CORPORATION, et al.,
Respondents.

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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APPENDIX A.

STATISTICAL EXCERPTS AND EXTRAPOLATIONS

DEALER ENTERPRISE PROGRAM

ANNUAL REVIEW OF DODGE DIVISION DEALERSHIP OPERATIONS

1964-1970

(A1)

Year	Percent of Dodge Total Sales by Dealer-ship in Chrysler Facilities	Percent of Dodge Sales D.E. Dealer-ships	Number of D.E. Dealer-ships at End of Period	D.E. Unit Sales	Actual Profit/(Loss) Before Taxes	Actual Profit/ (Loss) Per Unit Sold	Amount Required to Buy Out/ Convert (Preferred Stock)	Normal Return Before Taxes 14%	Total Subsidy Per Unit Sold
1964	17.4	12.1	105	54,758 (11 mos.)	149,824 (11 mos.)	2.74	2,715,500	380,170	(4.21)
1965	20.2	11.9	112	57,352 (10 mos.)	(179,151) (10 mos.)	(3.12)	1,760,400	246,456	(7.42)
1966	23.3	12.2	118	67,835 (11 mos.)	(198,319) (11 mos.)	(2.92)	8,265,100	1,157,114	(19.98)
1967	26.8	14.6	145	80,513	(803,242)	(9.98)	15,651,100	2,191,154	(37.19)
1968	30.2	16.3	146	108,722	1,368,496	12.59	16,357,400	2,290,036	(8.48)
1969	32.0	16.5	161	101,731	(3,526,926)	(34.67)	19,033,400	2,664,676	(60.86)
1970	36.1	18.4	163	96,288 (11 mos.)	(7,191,781) (11 mos.)	(74.69)	15,061,020	2,108,542	(96.59)

A review of lists of active and inactive Chrysler-Dodge D.E. Dealers 1967-1973 discloses that at the end of 1973, there were 296 D.E. dealers who had become D.E. dealers at various times before the end of 1973 and were still active; that another 131 D.E. dealerships had been liquidated, and that 81 dealerships (16.3% of the total) had been bought out by the private capital investor-operator.

DIRECT SUBSIDIES OF PHILADELPHIA REGION

DODGE D.E. DEALERS BY CHRYSLER, 1964-1970

Year	Dealer	Chrysler Direct Investment	Operating Results	Total Units Sold	Total Investment All Dealers	Normal Return on Investment Before Taxes (14%)	Total Operating Results Before Taxes	Total Gain-Loss Including Normal Return Before Taxes	Average Gain-Loss/ Unit Before Taxes
1964	Eagle	$ 72,700	$ (49,000)						
	Crescent	96,000	(94,000)						
	Jenkintown	102,900 (9 mos.)	(61,000)						
	Overbrook	86,200 (9 mos.)	(53,000)	2,854	$ 689,700	$ 66,774	$(267,000)	$(333,774)	$(116.94)
	Springfield	108,000 (4 mos.)	(25,000)						
	Northeast	83,700	61,000						
	Quaker City	140,200 (4 mos.)	(46,000)						
1965	Eagle	80,200	(72,000)						
	Crescent	96,000	(107,000)						
	Jenkintown	102,900	(4,500)						
	Overbrook	85,200	(120,010)						
	Springfield	108,000	44,000	4,722	821,700	107,951	(284,510)	(392,461)	(83.11)
	Northeast	83,700	71,000						
	Quaker City	197,200	(73,000)						
	Cherry Hill	67,500 (3 mos.)	(23,000)						
1966	Eagle	80,200 (10 mos.)	(66,000)						
	Crescent	96,000	(159,000)						
	Jenkintown	120,000	14,500						
	Overbrook	97,500	(66,000)						
	Springfield	104,100	64,000	5,487	908,900	125,375	(128,500)	(253,875)	(46.27)
	Northeast	73,600	35,000						
	Quaker City	270,000	63,000						
	Cherry Hill	67,500	(14,000)						

1967	Crescent	96,000 (2 mos.)	(32,000)						
	Jenkintown	112,900	52,000						
	Overbrook	97,500	(6,000)						
	Springfield	95,800	127,000						
	Northeast	59,600	(1,100)	5,237	1,007,800	114,632	255,723	255,723	48.83
	Quaker City	270,000	163,000						
	Cinnaminson	90,000 (6 mos.)	(12,000)						
	Cherry Hill	90,000	8,000						
	Black Horse	96,000 (4 mos.)	(43,177)						
1968	Jenkintown	104,800 (10 mos.)	43,000						
	Overbrook	97,500	(72,000)						
	Springfield	75,800 (4 mos.)	73,000						
	Deel	105,000 (9 mos.)	(28,000)						
	Northeast	59,600	31,000	6,100	991,500	125,615	74,000	(51,615)	(8.46)
	Quaker City	270,000	(8,000)						
	Cinnaminson	90,000	6,000						
	Cherry Hill	92,800	48,000						
	Black Horse	96,000	(19,000)						
1969	Overbrook	120,000 (10 mos.)	(150,000)						
	Deel	150,000	(204,000)						
	Northeast	52,500	39,000						
	Quaker City	337,500	(84,000)	5,014	923,100	126,434	(301,000)	(427,434)	(85.25)
	Cinnaminson	89,500	31,000						
	Cherry Hill	77,600	(34,000)						
	Black Horse	96,000	101,000						
1970	Deel Dodge	150,000	(136,000)						
	Northeast	52,500	24,000						
	Quaker City	337,500	(119,000)						
	Cinnaminson	89,500 (5 mos.)	40,000	4,485	771,800	100,743	(229,000)	(329,743)	(73.52)
	Cherry Hill	58,200	38,000						
	Black Horse	84,100	(76,000)						

Direct Subsidies of S. Jersey Dodge D.E. Dealers by Chrysler—1964-1970

Year	Dealer	Chrysler Direct Investment	Operating Results	Total Units Sold	Total Investment of Chrysler	Normal Return on Investment Before Taxes (14%)	Total Operating Results Before Taxes	Total Gain-Loss Including Normal Return Before Taxes	Average Gain-Loss/Unit Before Taxes
1964	Crescent	$96,000	$ (94,000)	573	$ 96,000	$13,440	$ (94,000)	$(107,440)	$(187.50)
1965	Crescent	96,000	(107,000)	520	163,500	15,803	(130,000)	(145,803)	(280.39)
	Cherry Hill	67,500 (3 mos.)	(23,000)						
1966	Crescent	96,000	(159,000)	1,240	163,500	22,890	(173,000)	(195,890)	(157.98)
	Cherry Hill	67,500	(14,000)						
1967	Crescent	96,000 (2 mos.)	(32,000)	1,069	372,000	25,620	(79,177)	(104,797)	(98.03)
	Cinnaminson	90,000 (6 mos.)	(12,000)						
	Cherry Hill	90,000	8,000						
	Black Horse	96,000 (4 mos.)	(43,177)						
1968	Cinnaminson	90,000	6,000	1,748	278,800	39,032	35,000	(4,032)	(2.31)
	Cherry Hill	92,800	48,000						
	Black Horse	96,000	(19,000)						
1969	Cinnaminson	89,500	31,000	1,913	263,100	36,834	98,000	98,000	51.23
	Black Horse	96,000	101,000						
	Cherry Hill	77,600	(34,000)						
1970	Cinnaminson	89,500	40,000	2,004	231,800	32,452	2,000	(30,452)	(15.20)
	Black Horse	84,100	(76,000)						
	Cherry Hill	58,200	38,000						

Operating Results of Dodge D.E. Dealers in Philadelphia Region, Chrysler Credit (Without Subsidy) and Chrysler Corporation Nationally

	Philadelphia D.E. Dealers as a Group			Chrysler Credit			Chrysler Corporation	
Year	*Total Direct Investment*	*Normal ROI Before Taxes 14%*	*Total Operating Results*	*Total Direct Investment*	*Normal ROI After Taxes 8%*	*Total Results Without Subsidy*	*Unit Sales*	*Net Profit (Loss)*
1964	$ 689,700	$ 66,774	$(267,000)	—	—	—	1,807,258	$213,770,000
1965	821,700	107,951	(284,510)	$110,000,000	$ 8,800,000	$ 167,000	2,076,523	233,377,000
1966	908,900	125,375	(128,500)	135,000,000	10,800,000	184,000	2,134,024	189,223,000
1967	1,007,800	114,632	255,723	150,000,000	12,000,000	2,914,000	2,251,803	200,434,000
1968	991,500	125,615	74,000	212,000,000	16,960,000	2,583,000	2,623,868	290,729,000
1969	923,100	126,434	(301,000)	227,500,000	18,200,000	(2,134,000)	2,445,445	88,771,000
1970*	771,800	100,743	(229,000)	293,800,000	23,504,000	(6,000,000)	2,459,336	(7,603,000)

* According to Chrysler Corporation's Annual Report for 1970 (statement on page 2), "The U. S. economy during 1970 experienced a combination of inflation and recession, high unemployment, high interest rates and restricted growth. Customer confidence was weakened by economic and social problems at home and by serious crises in the Middle East and Southeast Asia. A major strike in the automotive industry cut North American vehicle production and added to the consumers lack of confidence. As a result, United States automobile industry sales for the year reached the lowest point since 1962.

The company's financial results for 1970 reflect these economic factors. There was a drop in North American factory sales of 64,939 cars and trucks . . ."

EXHIBIT P-253
KUEHN EXHIBIT 4

Year		Investment in Chrysler Realty	Normal Return on Investment *	Operating Profit	Less: Service Fees From Affiliated Companies	Net Operating Loss	Loss of Return on Inv. + Loss	No. of Dealerships Serviced	Total Loss Per Dealership
1967	Stock	$ 62,500,000	$10,000,000						
	Notes	92,100,000	1,842,000						
	Guarantees	18,700,000	187,000						
	Total	173,300,000	12,029,000	$ 300,000	$ 925,000	$(625,000)	($12,654,000)	500	($25,308)
1968	Stock	96,500,000	15,440,000						
	Notes	96,600,000	1,932,000						
	Guarantees	42,500,000	425,000						
	Total	235,600,000	17,797,000	1,400,000	3,500,000	(2,100,000)	(19,897,000)	550	(36,176)
1969	Stock	130,100,000	20,816,000						
	Notes	54,100,000	1,082,000						
	Guarantees	100,000,000	1,000,000						
	Total	284,200,000	22,898,000	1,845,000	3,950,000	(2,105,000)	(25,003,000)	600	(41,672)
1970	Stock	134,200,000	21,472,000						
	Notes	57,300,000	1,146,000						
	Guarantees	99,000,000	990,000						
	Total	290,500,000	23,608,000	2,000,000	4,500,000	(2,500,000)	(26,108,000)	650	(40,166)

EXCERPT FROM EXHIBIT 254.

Retail Price Level—established by Chrysler D.E. Dealers		
MINUS		
Manufacturer's Net Price to Dealers—established by Chrysler		
MULTIPLIED BY		
Number of New Units Sold		
EQUALS		
Total Gross Profits		$157,104.00
less	2% Holdback	39,024.00
	Bonuses	31,342.00
Maximum Cash in Hand (provided no trade-in)		$ 86,738.00
Cash in Hand	$86,738.00	
DIVIDED BY		
Number of New Cars Sold	769	
Profit per car	$ 112.00	
MINUS		
Salesman's Commission per car	50.75	
Maximum Cash Profit per car	$ 61.25	

Other Operating Expenses to be paid from Cash in Hand

1) Dealer overhead
2) Trade-in carrying expense
3) Wholesale finance charges
4) Retail finance reserve
5) Warranty expense
6) Repossession exposure

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 1077-70

MARTIN B. GLAUSER DODGE CO.,
Plaintiff,

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Defendants.

ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR NEW TRIAL

OPINION.

(Filed August 20, 1976)

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COHEN, *Senior Judge:*

Defendants have moved for judgment notwithstanding the verdict or alternatively a new trial, following an

adverse jury verdict in this private antitrust action brought pursuant to section 4 of the Clayton Act, 15 U. S. C. § 15.[1] The jury found that the defendants entered into a combination or conspiracy in unreasonable restraint of trade or commerce in violation of section 1 of the Sherman Act, 15 U. S. C. § 1,[2] causing injury to the plaintiff in the amount of 1.3 million dollars. This award was later trebled by the court to 3.9 million dollars. In support of these post-trial motions defendants assert three grounds. First, defendants contend that the plaintiff's theory of liability and method of computation of damages were invalid. Next, it is argued that the evidence was insufficient to support a finding that any of the defendants violated section 1 of the Sherman Act. Finally, defendants maintain that trial errors and infirmities in the court's charge warrant a new trial. For the reasons discussed below, the motions will be denied.

The central question presented here is whether and to what extent an automobile manufacturer may subsidize its partially owned dealers without providing similar assistance to independent dealers. More specifically the issue is whether the defendants' implementation of a vertically integrated distribution system had the effect of reducing intrabrand competition so as to violate section 1 of the Sherman Act. On motion for judgment notwithstanding the verdict pursuant to *Fed. R. Civ. P.* 50(b)

1. 15 U. S. C. § 15 provides: Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

2. 15 U. S. C. § 1 provides in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

the court is required to accept the evidence and all reasonable inferences in the light most favorable to the plaintiff. *Continental Ore Co. v. Union Carbide,* 370 U. S. 690, 696 (1962); *Tennant v. Peoria & P. U. Ry.,* 321 U. S. 29, 35 (1944); *Coleman Motor Co. v. Chrysler Corp.,* 525 F. 2d 1338, 1344 (3rd Cir. 1975); *Denney v. Siegel,* 407 F. 2d 433, 439 (3rd Cir. 1969). Plaintiff, Martin B. Glauser Dodge Co. (Glauser Dodge) is a family owned New Jersey corporation which operated an automobile dealership in Vineland, New Jersey. Between February, 1964 and July, 1970 Glauser Dodge and its predecessor proprietorship owned by Martin B. Glauser sold and serviced new dodge automobiles and trucks pursuant to a franchise agreement with Chrysler Motors; and in addition sold used cars.

Chrysler Motors Corporation is a wholly owned subsidiary of Chrysler Corporation engaged in distribution. Chrysler Credit Corporation, which is a wholly owned subsidiary of Chrysler Financial Corporation, extends wholesale credit to and purchases retail installment contracts from Chrysler dealers. Chrysler Financial Corporation, in turn, is a wholly owned subsidiary of Chrysler Corporation and is the source of capital for the entire Chrysler financial operation. Chrysler Realty, also a wholly owned subsidiary of Chrysler Corporation, acquires, develops, and administers property for Chrysler dealer sites.

In an attempt to increase its overall market penetration Chrysler Corporation developed a Dealer Enterprise (DE) program. The major tenets of this marketing program are revealed in what has been identified as the "Quinn Memorandum."[3] The program envisioned the

3. The "Quinn Memorandum" refers to a report, written in 1961 by Mr. E. C. Quinn, Sales Vice-President for Chrysler, entitled "Market Representation Program." Exhibit P-7.

resurrection of Chrysler's dealership system through the infusion of venture capital to be provided in large part by Chrysler itself. As the Quinn Memorandum points out, outside investors did not find automobile dealerships in general, and Chrysler Corporation in particular, sufficiently attractive to provide the necessary venture capital. The money provided was to be used in three general areas: capitalization, facilities, and launching costs. The following practices, *inter alia*, were recommneded: [4]

1. Acquisition of existing facilities and leasing to operator;
2. Mortgage on existing facilities;
3. Sponsorship of capital loan program through finance companies whereby finance companies administer and Chrysler Corporation assumes partial financial responsibility;
4. Assumption of lease or guarantee of lease on existing facilities or facilities to be constructed; and
5. Use of contractual start up plan in relation to assumption of operating losses by Chrysler Corporation for a specified period. . . .

Under the Dealer Enterprise plan Chrysler supplied up to 75% of the capital needed to finance a new dealership. The 25% owner became manager of the dealership and could ultimately purchase the stock held by Chrysler out of his share of the profits. Until that time, however, Chrysler retained majority control. The program consistently produced net operating losses at the dealer level, but greater market penetration and the resulting increases in production permitted more efficient utilization of manufacturing facilities. Thus, as was explained by plaintiff's expert, Dr. Kuehn, the retail losses were offset by increased profits

4. Exhibit P-7 at 9.

at the manufacturing level. This pattern of operating losses at the retail level, experienced by DE dealers nationally, was also reflected by the four Camden area Dodge DE dealers which were in competition with the plaintiff.

The essence of plaintiff's antitrust claim is that the Dealer Enterprise marketing program operated in a discriminatory fashion vis-a-vis private capital dealers. There was evidence adduced at trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers, such as the plaintiff, could afford to charge. (2) Superior physical facilities were provided to DE dealers on terms which were not available to competing private capital dealers. (3) DE dealers were permitted to sell retail installment contracts to Chrysler Credit Corporation on a without recourse basis, whereas plaintiff was required to guarantee to repurchase defaulted retail installment contracts of its customers. (4) DE dealers were permitted to operate in an out-of-trust condition when experiencing cash flow problems, whereas plaintiff's credit was immediately revoked when it was out of trust. (5) Restrictions on plaintiff's wholesale lines of credit, as well as its inability to sell its commercial retail paper without recourse, precluded plaintiff from participating in revenue-producing sales contests to the same degree as DE dealers. (6) Plaintiff did not receive the new vehicles it had ordered for its 1969 opening, even though an ample number of such vehicles were delivered to the DE dealers in the Camden area.

The jury returned the following verdict in response to special interrogatories:

1. Did any of the defendants enter into any combination or conspiracy in unreasonable restraint of trade or commerce? Yes or no.

ANSWER: *Yes.*

2. If your answer to question 1 is yes, then which defendants did combine or conspire?

ANSWER: *Chrysler Corporation, Chrysler Motors Corporation, Chrysler Financial Corporation, Chrysler Credit Corporation, Chrysler Corporation.*

3. If your answer to question number 1 is yes, then was the plaintiff, Glauser Dodge Co. injured as a proximate result of such combination or conspiracy?

ANSWER: *Yes.*

4. If your answers to questions 1 and 3 are yes, state the amount of damages?

ANSWER: *1.3 million dollars.*

I. RESTRAINT OF TRADE.

Defendants contend that the evidence at trial was legally insufficient to support a finding that any defendant combined or conspired in unreasonable restraint of trade or commerce in violation of section 1 of the Sherman Act. The plaintiff does not assert that the mere existence of Chrysler's Dealer Enterprise program constituted a violation of the Act. Rather, the "rule of reason," *Standard Oil Co. v. U. S.*, 221 U. S. 1 (1911), must be applied in determining whether the implementation and operation of the Dealer Enterprise program, by the defendants in this case, had the effect of unreasonably discriminating in favor of the factory-controlled dealers to the detriment of competing private capital dealers resulting in an unreasonable restraint of trade or commerce.

A combination or conspiracy is, of course, an essential element of a section 1 violation. Defendants have argued

that a corporation cannot combine or conspire with its subsidiaries.[5] The Supreme Court has made clear, however, that

> [e]ven commonly owned firms must compete against each other, if they hold themselves out as distinct entities. "The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act."

U. S. v. Citizens and Southern National Bank, 422 U. S. 86, 116-117 (1975), *citing U. S. v. Yellow Cab Co.*, 332 U. S. 218, 227 (1947). *See Perma Life Mufflers, Inc. v. Int'l. Parts Corp.*, 392 U. S. 132, 141-42 (1968). The Court of Appeals for the Third Circuit has specifically held in *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3rd Cir. 1975) that "although a party cannot combine or conspire with itself, a parent corporation, such as [Chrysler Corporation], can combine or conspire with its wholly owned subsidiaries." *Id.* at 1345. In order to show that a Sherman Act conspiracy existed plaintiffs are not required to prove that the defendants entered into an explicit agreement. *U. S. v. General Motors Corp.*, 384 U. S. 127, 132-43 (1966); *U. S. v. Parke-Davis & Co.*, 362 U. S. 29, 44-45 (1960). Circumstantial evidence including the conduct of the parties may be relied upon to prove the existence of the conspiracy or agreement. *Coleman*, 525 F. 2d at 1345. The various acts complained of should be viewed together in determining whether defendants entered into a combination or conspiracy. As the Supreme Court stated in *Continental Ore Co. v. Union Carbide*, 370 U. S. 690 (1960):

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated law suits.

5. Defendant's main brief, at 100.

> We think that this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components in wiping the slate clean after scrutiny of each. "[T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten,* 226 U. S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it." *American Tobacco Co. v. United States,* 147 F. 2d 93, 106 (C. A. 6th Cir.) See *Montague & Co. v. Lowry,* 193 U. S. 38, 45-46.

370 U. S. at 698-99.

Not only was there considerable direct testimony concerning the overall plan to give preferential treatment to DE dealers, but there was also circumstantial evidence that the named defendants were part of a combination or conspiracy. Both Chrysler Credit, which absorbed losses on DE dealers' retail installment paper, and Chrysler Realty, which leased facilities to DE dealers for less than the amount required to amortize the underlying loans for construction of those facilities, received direct contributions from Chrysler Corporation and Chrysler Motors Corporation. Thus sufficient evidence was presented to create a jury question as to whether a combination or conspiracy existed among the named defendants. *See Coleman,* 525 F. 2d at 1345; *Mt. Lebanon Motors, Inc. v. Chrysler Corp.,* 283 F. Supp. 453, 458 (W. D. Pa. 1968), *aff'd.,* 417 F. 2d 622 (3rd Cir. 1969).

Defendants further contend that economic activities are not actionable under the antitrust laws unless they cause an injury to the public.[6] The Sherman Act was, of

6. Defendants' main brief, at 101.

course, designed to protect the public from injury, *Coleman,* 525 F. 2d at 1346. Congress determined by legislative fiat, however, that certain classes of restraints of trade were by their "nature or character" injurious to the public. *Klors v. Broadway-Hale Stores,* 359 U. S. 207, 210-211 (1959); *Radovich v. National Football League,* 352 U. S. 445, 453-454 (1957); *Apex Hosiery Co. v. Leader,* 310 U. S. 469, 493 (1940); *Standard Oil Co. v. U. S.,* 221 U. S. 1, 58, 65 (1911). Where economic activities have a "tendency" to unreasonably restrain trade in light of the congressionally determined criteria of public harm, "it [is] not for the courts to decide whether in an individual case injury [has] actually occured." *Klors v. Broadway-Hale Stores,* 359 U. S. 207, 211 (1959), *citing Standard Oil Co. v. U. S.,* 221 U. S. 1, 63-68 (1911). *See Radovich v. National Football League,* 352 U. S. 445, 453-454 (1957); *Standard Sanitary Manufacturing Co. v. U. S.,* 226 U. S. 20, 49 (1912); *U. S. v. American Tobacco Co.,* 221 U. S. 106, 179 (1911). Therefore, in a private antitrust action the plaintiff is not required to prove an injury to the public as a material element in his case. *Coleman,* 525 F. 2d at 1346.

It is essential, however, that plaintiff show that the challenged practices adversely affected "competition in the marketplace." *U. S. v. Arnold Schwinn & Co.,* 388 U. S. 365, 375 (1967); *Wright Motor Co. v. U. S.,* 372 U. S. 253, 262 (1963); *Coleman,* 525 F. 2d at 1346; *Venzie Corp. v. United States Mineral Products Co.,* 521 F. 2d 1309, 1316 (3rd Cir. 1975). Regardless of the extent of injury suffered by Glauser Dodge there can be no recovery unless the defendants' conduct produced a substantially adverse effect on competition in the relevant market. As the Supreme Court emphasized in *Brown Shoe Co. v. U. S.,* 370 U. S. 294 (1962), "[i]t is competition, not competitors which the Act protects." *Id.* at 344.

There was sufficient evidence adduced at trial to permit the jury to infer that as a result of the defendants' preferential treatment of the DE dealers, Glauser Dodge was eventually forced out of business. The court of appeals in *Coleman, supra,* found that the elimination of an independent Chrysler dealer, as a result of the implementation of Chrysler's Dealer Enterprise program, had an adverse effect on competition in the marketplace. 525 F. 2d at 1347. The court reasoned that there was an impact upon the prices charged for new automobiles and the service provided by Chrysler Dealers.

> [W]e perceive an anti-competitive effect from the elimination of the Coleman dealership. As long as there are several Dodge dealerships with different owners, they can compete within the narrow range of price jurisdiction for the sales of those persons who want Dodge vehicles. The elimination of an independent dealer diminishes that competition. If all independent dealerships were eliminated, Chrysler could eliminate price competition within the full range of price jurisdiction. Another area of competition between automobile dealers is service. If all independent dealers were eliminated, competition in price of parts and service and in quality of service could also be eliminated. . . . [I]t is common knowledge that quality of service is vital to a successful automobile dealership.

525 F. 2d at 1347. (citations omitted).

In *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453 (W. D. Pa. 1968), the plaintiff urged essentially the same arguments as did Glauser Dodge in attacking Chrysler Corporation's implementation of the Dealer Enterprise program. There was evidence offered tending to show that the Chrysler-financed dealerships engaged in predatory practices to eliminate independent competitors, and that losses at the retail level were offset by Chrysler's manufacturing profits. The court concluded that a jury question was presented as to whether Chrysler's forward integration resulted in an unreasonable restraint of trade, 283 F. Supp. at 457-460, and the Court of Appeals for the Third Circuit affirmed. 417 F. 2d 622 (3rd Cir. 1969). *Mt. Lebanon Motors* was also cited with approval by the court of appeals in *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3rd Cir. 1974).

The district court in *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W. D. Pa. 1973) also found a violation of the antitrust laws resulting from Ford Motor Company's implementation of its manufacturer-financed dealership program.

> Ford Motor Company, by operating factory stores and dealer development stores which were under its domination, was in competition with its own dealers. Therefore, when it adopted a course of action in combination with such stores to drive any of these independent dealers out of business or to dominate the market, it was certainly engaged in combination or conspiracy or [sic] restraint of trade under the Sherman Act. *See United States v. McKesson and Robbins, Inc.*, 351 U. S. 305 (1956).

355 F. Supp. at 865. The court of appeals reversed on other grounds, discussed *infra,* but did not disturb the above analysis, stating that their "decision . . . in no way undermines the proposition that automobile manufacturers are subject to the strictures of the antitrust laws in the operation of their wholly owned outlets." *Rea v. Ford*

Motor Co., 497 F. 2d 577, 590 (3rd Cir. 1974). Moreover, it has been held that the elimination of competitors from any substantial market constitutes a restraint of trade, regardless of whether there is a discernible impact upon the national economy. *Klors v. Broadway-Hale Stores*, 359 U. S. 207, 213 (1959); *International Salt Co. v. U. S.*, 332 U. S. 392, 395-396 (1947); *Mt. Lebanon Motors*, 283 F. Supp. at 459.

It must also be shown, of course, that the defendants' actions which resulted in a restraint of trade were unreasonable. In determining whether or not a particular combination or conspiracy restrained trade unreasonably, one of the factors the jury must consider is the business or economic rationale which motivated the defendants' conduct. *U. S. v. Arnold Schwinn & Co.*, 388 U. S. 365, 375 (1967); *Chicago Board of Trade v. U. S.*, 246 U. S. 231, 238 (1918). The defendants point out that it is not unlawful for an automobile manufacturer to create new retail outlets and to provide financial assistance to them. They argue that it was necessary to fill gaps in their retail distribution system in order to compete effectively against General Motors Corporation and Ford Motor Company. Any adverse effect upon intrabrand competition, defendants contend, would be justified by the enhancement of interbrand competition. The Supreme Court has made clear, however, that legitimate business motives do not immunize otherwise objectionable conduct. *U. S. v. Arnold Schwinn & Co.*, 388 U. S. 365, 375 (1967); *Delaware Valley Marine Supply Co. v. The American Tobacco Co.*, 184 F. Supp. 44 (E. D. Pa. 1960), *aff'd.* 297 F. 2d 199 (3rd Cir.), *cert. denied* 369 U. S. 839 (1962). The defendants' business reasons are relevant only "because knowledge of intent may help the Court to interpret facts and to predict the consequences." *Chicago*

Board of Trade v. U. S., 246 U. S. 231, 238 (1918). Rather, the court's inquiry must focus upon effect, not intent. *Coleman*, 525 F. 2d at 1345, n. 10.

While there is nothing inherently unlawful in attempting to increase profits at the manufacturing level by operating retail outlets at a loss or break-even basis, *Mt. Lebanon Motors*, 283 F. Supp. at 458, *citing U. S. v. Aluminum Co. of America*, 233 F. Supp. 718, 727-728 (E. D. Mo. 1974) and *Reynolds Metal Co. v. FTC*, 309 F. 2d 223, 229 (D. C. Cir. 1962), a violation of the Sherman Act results if competition in the marketplace is adversely affected in the process. The court of appeals explained in *Coleman, supra*, that although a totally vertically integrated distribution structure may be permissible, "it is at least subject to the qualification that a lawful end achieved by unlawful means is not protected from the antitrust laws." 525 F. 2d at 1347. While the Sherman Act, to be sure, is aimed at preserving competitive activity, there is no justification for violating the Act in one particular market in order to further competition in a larger, more important market. In *U. S. v. Topco Associates Inc.*, 405 U. S. 596 (1972) the Supreme Court stated that:

> [a]ntitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster. Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or

> groups believe that such foreclosure might promote greater competition in a more important sector of the economy. Cf. *U. S. v. Philadelphia National Bank*, 374 U. S. 321, 371 (1963).

405 U. S. at 610. In any event, defendants' desire to increase Chrysler's competitiveness on the interbrand level does not explain the reasonableness of their conduct. Indeed, this goal could have been more effectively pursued had the financial and other assistance which the defendants provided DE dealers, been extended to independent dealers as well. The court concludes that sufficient evidence was adduced at trial to support a finding that the defendants violated section I of the Sherman Act.

II. Theory of Damages.

Recovery under section 4 of the Clayton Act, 15 U. S. C. § 15 is not warranted merely by proof that the defendants have violated the antitrust laws. In addition, it must be demonstrated that the defendants' conduct caused injury to the plaintiff's "business or property." The plaintiff must then show the amount of damages which have been suffered, using a reasonable method of computation.

The fact of injury may be shown by circumstantial evidence. Due to the practical difficulty of marshalling evidence in private antitrust actions, the Supreme Court has stated that the fact of injury should not be subject to a rigorous standard of proof. *Zenith Corp. v. Hazeltine*, 395 U. S. 100 (1969):

> Trial and appellate courts alike must . . . observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion

> from a market; damage issues in these cases are rarely susceptible of the kind of concrete detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the fact finder may "conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants wrongful acts had caused damage to the plaintiffs."

Id. at 123-124, citing *Bigelow v. RKO Pictures, Inc.*, 327 U. S. 220, 264 (1946). The fact finder may draw a reasonable inference from the evidence presented at trial to conclude that a causal relationship existed between the defendants' conduct and the injuries complained of:

> [T]he jury may find a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. In such circumstances "juries are allowed to act upon probable and inferential, as well as direct and positive proof." *Story Parchment Co. v. Patterson Co.*, 282 U. S. 555, 561-564 (1931), *Eastman Kodak Company v. Southern Photo Co.*, 273 U. S. 359, 377-379 (1927).

Bigelow v. RKO Pictures, Inc., 327 U. S. 220, 264-265 (1946). The court must determine, then, whether sufficient evidence was produced for the jury to find a "reasonable probability," *Flintkote Co. v. Lysfjord*, 246 F. 2d 368, 392 (9th Cir. 1957), that the defendant's conduct was a "material cause of some injury to [plaintiff's] business or property." *Rea v. Ford Motor Co.*, 497 F. 2d 577, 589 (3rd Cir. 1974).

Although the theory of the section I violation of this case is based upon the elimination of the plaintiff from the marketplace, recovery is not limited to the value of Glauser Dodge as a going concern when it was forced out of business.[7] Defendants are also liable for causing injuries to the plaintiff while it was still in business, if those injuries contributed to its ultimate elimination from the marketplace. *See Brown Shoe Co. v. U. S.*, 370 U. S. 294, 346 (1962); *Klors v. Broadway-Hale Stores*, 359 U. S. 207, 213-214 (1959); *Times-Picayune*, 345 U. S. 594, 622-623 (1953); *International Salt Company v. U. S.*, 332 U. S. 392, 396 (1947); *NBO Industries Treadway Companies v. Brunswick Corp.*, 523 F. 2d 262, 272 (3rd Cir. 1975).

Once the fact of injury has been established, the plaintiff must then show the amount of damages suffered by a reasonable method of computation without resorting to speculation or guess work. *Bigelow v. RKO Pictures*, 327 U. S. 220, 264 (1946). As with the fact of injury, however, courts have not insisted upon unduly rigorous proof of the quantum of plaintiff's injury. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123-124 (1969); *Story Parchment Co. v. Patterson Parchment*

7. Defendants incorrectly cite *Coleman* for the proposition that a plaintiff asserting a "company dealership" claim must prove that it was, in fact, eliminated from the marketplace. Defendants supplemental brief, at 5-6. The court in *Coleman* did not take this position, nor did it imply that damages would be limited to the value of the business destroyed. *See Coleman*, 525 F. 2d at 1351-1353. It is well settled that "the antitrust laws strike equally at nascent and accomplished restraints of trade, monopolistic designs as well as results are reached by the prohibition of the Sherman Act." *Times-Picayune v. U. S.*, 345 U. S. 594, 622-623 (1953). See discussion, *infra*, regarding damages recoverable for injuries incurred prior to elimination from the marketplace. In any event, there was sufficient evidence presented at trial to support a jury finding that defendants' conduct in violation of the antitrust laws resulted in the demise of Glauser Dodge.

Paper Co., 282 U. S. 555, 563-564 (1931); *Coleman*, 525 F. 2d at 1352-1353. The liberal standard for computation of damages in private antitrust actions has been adopted not only because of practical limits of the burden of proof, but also in view of the public function served by such actions.[8]

Thus, both the fact of injury and the quantum of damages must be analyzed for each element of damages sought by the plaintiff. The first claim for recovery is based upon the defendants' subsidy of the Camden area DE dealers' operating losses. The theory of the operating loss subsidy was explained by the plaintiff's expert witness, Dr. Kuehn, as follows: The Camden area DE dealers sold new automobiles at a minimal markup resulting in overall operating losses which were subsidized by Chrysler. Since the prices Glauser Dodge could charge for new automobiles were, in effect, controlled by these competitors, Glauser suffered a direct injury from this discriminatory treatment. Dr. Kuehn computed the amount by which the DE dealers' return on investment fell short of a projected 14 per cent "normal" pre-tax profit. He then determined the average loss-per-car absorbed by the DE dealers and multiplied that figure by the number of units sold each year by the plaintiff. Although there was conflicting testimony at trial, sufficient evidence was presented for the jury to conclude that the DE dealers' overlapping sales territory and advertising practices forced Glauser Dodge to sell new automobiles at approximately the same low markups. In contrast to *Rea v. Ford Motor Co.*, 497 F. 2d 577 (1974), the plaintiff here has demonstrated the fact of injury resulting from the defendants' discriminatory conduct. The plaintiff in *Rea* employed a subsidy approach, but failed to demonstrate any direct injury to his business or prop-

8. Areeda, *Anti-Trust Violations without Damage Recoveries*, 89 *Harv. L. Rev.* 1127 (1976).

erty. The independent dealer produced no evidence that the Ford-owned outlets engaged in predatory price cutting, or that it had been compelled to lower prices. The plaintiff made no attempt to show that it had incurred greater operating expenses or had lost any profit as a result of the operation of the company-owned outlet. The court of appeals observed that the attorney for the independent dealer expressly disavowed any such claims:

> What our position is in this case is what 22 Ford did or did not do is not relevant because we are not asserting in our case that 22 Ford sustained a loss of profits . . . [W]e haven't put any evidence in the record to indicate any particular loss sustained by 22 Ford.

497 F. 2d at 589.

Plaintiff asserts that since its prices were controlled by the DE dealers, the measure of damages is, therefore, a proportional amount of the discriminatory subsidies provided by Chrysler. Glauser's profit margin was decreased to the extent its competitors were illegally favored.[9] This method of computing damages is a reasonable estimate of those profits lost by Glauser Dodge which can be traced to illegal conduct by the defendants. The computed subsidies for operating losses-per-car of the Camden area DE dealers are as follows:

1964	$187.50
1965	280.39
1966	157.98
1967	98.03
1968	2.31
1969	None
1970	15.20

9. Plaintiff's main brief, at 112.

The plaintiff perhaps could have sought a greater recovery for lost profits by subtracting the actual average markup on new automobiles from some hypothetical markup which the market would have borne absent competition from the Camden area DE dealers.[10] Such an approach in this case, however, would have failed to account for the effect of lawful competition from these DE dealers. *See Coleman*, 525 F. 2d at 1352.[11] If a direct correlation can be shown between an antitrust defendants' discriminatory conduct and the profits lost by the plaintiff, the amount of discrimination is an acceptable measure of damages. *See Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 489 (1968); *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 757 (1947); *cf. Union Carbide and Carbon Corp. v. Nisely*, 300 F. 2d 561, 580 (10th Cir. 1961). Where "prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." *Bruce's Juices v. American Can Co.*, 330 U. S. 743, 757

10. For example, plaintiff might have asserted one of the two major theories of proving lost profits in private antitrust suits. By using the "before and after" approach Glauser might have introduced evidence of the average markup on its new automobiles prior to the depressing influence of the DE dealers. By using the "yardstick" test plaintiff could have shown the average markup used by firms closely comparable to Glauser Dodge which were unaffected by such restraints during the time period in question. See Note, *Private Treble Damages Anti-Trust Suits; Measure of Damages for Destruction of All or Part of a Business*, 80 *Harv. L. Rev.* 1566, 1574-1575 (1967).

11. For illustrative purposes only, if we assume that the market would bear a markup of $400, lawful competition from four new Chrysler dealers in the area making a normal return on investment of 12% might reduce the competitive selling price to a markup of, for instance, $300. If as a result of discriminatory subsidies from Chrysler these dealers were able to reduce their markup to $200, the plaintiff's actual injury attributable to the unlawful conduct of the defendants would amount to only $100 per automobile, rather than $200.

(1947). "The reason is that he has paid more than he should and his property had been illegally diminished, for had the price been lowered his profits would have been higher." *Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 489 (1968). In the instant case, instead of directly overcharging the plaintiff, the defendants have obtained the same result by subsidizing the competition which established the plaintiff's sales price. Thus, Glauser's lost profits can be measured by the amount of discrimination to which it has been subjected.[12]

Plaintiff then produced evidence of actual losses it had suffered as a result of the defendants' discriminatory refusal to purchase its retail paper on a without recourse basis. Glauser Dodge was forced to repossess and sell at a loss a substantial number of cars each year. The amount of damages for this fact of injury included the loss on the dealer's actual investment in each repossessed car, as well as the profit it would have realized normally in selling such a used car.

Plaintiff demonstrated a fact of injury and a reasonable measure of damages to support its claim for interest losses on its Chrysler Credti reserve account and short term borrowings. Glauser was required to maintain a non-interest bearing reserve account to cover claims for

12. Defendants cite *ICC v. U. S.*, 289 U. S. 385 (1933) and *Enterprise Industries v. Texas Co.*, 240 F. 2d 457 (2d Cir. 1957) for the proposition that the amount of discrimination is not a permissible measure of damages in an antitrust suit. These cases, however, involved application of the "pass-on" defense to price discrimination suits, which has since been rejected by the Supreme Court. *Hanover Shoe v. United Shoe Machine Corp.*, 392 U. S. 481, 483, 495 (1968); Note, *Private Treble Damage Anti-Trust Suits; Measure of Damages for Destruction of All or Part of a Business*, 80 *Harv. L. Rev.* 1566, 1584-1586. In any event, the court in *Enterprise Industries v. Texas Co., supra*, conceded that where the plaintiff's profit margin is directly affected "the amount of the discrimination might well be a proper measure of [his] damages." *Id.* at 459.

repossessions, since its retail paper was not purchased on a without recourse basis. There was testimony that the defendants withheld payments for warranty work and incentive bonuses making it necessary for the plaintiff to obtain short term loans, thus incurring further interest losses.

There was also sufficient evidence of the fact of injury suffered by Glauser Dodge as a result of the defendants' failure to provide physical facilities comparable to those made available to the Camden area DE dealers.

Dr. Kuehn testified that the DE dealers were provided with superior facilities at rental rates which were less than the amounts a private capital dealer such as Glauser Dodge would have to expend to offset construction costs, depreciation, and principal payments on an amortized conventional loan for such facilities. The plaintiff computed the measure of damages by showing the actual costs it had incurred in 1969 and 1970 for reduction of principal and building depreciation. For the years 1965 to 1969 the plaintiff estimated the benefits it had been denied by determining the amount of construction costs, depreciation, and principal payments, from which the Camden area DE dealers had been exempted.

Plaintiff further claimed that as a result of being forced out of business by the defendants' cumulative discriminatory acts, it suffered a direct loss in the value of its new showroom facilities and the value of its inventory. Since the showroom facility was a single purpose property, the reduction in value was a direct result of the plaintiff being forced out of business. Evidence of the before and after value of the showroom facility was corroborated by the defendants' own appraisal of April 1, 1970, and the pretrial stipulation of the parties. The diminution in the value of plaintiff's inventory resulted from Chrysler's re-

fusal to purchase the inventory and sell it to another dealer as was its normal practice upon termination of a dealership. Instead plaintiff was forced to liquidate the inventory piecemeal at a substantial loss.

Plaintiff also sought recovery for the value of the business as a going concern. The current market value of a business is, in theory, the discounted present value of the estimated flow of future earnings.[13] A basis for this estimate is the record of profits for the business in prior years.[14] The evaluations of Glauser Dodge as a going concern, made by plaintiff's expert witness, William Tarlo, were based upon the operating statements of the business over a five year period. There was testimony that the operating statements were more reliable data than the corresponding tax returns of those years because of the tax treatment of parts and used car inventory. In computing the record of earnings over the prior five years, however, Mr. Tarlo failed to deduct as a business expense the salaries paid to Barry Glauser and Mrs. Glauser, thus inflating the records of profits. *Coleman*, 525 F. 2d at 1351-1352, n. 22.

Where it is apparent that as a matter of law certain identifiable sums were included in the jury's verdict which were improper, the court has the power to condition the denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in the specified amount. *Dimick*

13. Note, *Private Treble Damage Anti-trust Suits; Measure of Damages for Destruction for All or Part of Business*, 80 *Harv. L. Rev.* 1566, 1580-1581 (1967).

14. Since the challenged practices continued for several years leading up to the elimination of Glauser Dodge from the marketplace, the plaintiff properly presented to the jury estimates of the value of the business as a going concern based upon its actual performance in prior years and, alternatively, based upon the earnings which the business would have had absent the defendants' unlawful conduct.

v. Schiedt, 293 U. S. 474, 483-486 (1935); *Holmes v. Wack*, 464 F. 2d 86 (10th Cir. 1972); *Jones v. Friesel*, 207 F. Supp. 925, 926-927 (W. D. Pa. 1962). The portion of the claim for the value of the business as a going concern, which is attributable to the treatment of owners' salaries as earnings, can be accurately computed. For the two methods of evaluation employed by Mr. Tarlo the amounts are respectively $78,254.00 and $67,075.00.[15] Consistent with the right to trial by jury guaranteed by the Seventh Amendment, an excessive verdict should be reduced only to the maximum amount that the jury might properly have awarded. *U. S. v. 1,160.96 acres of land in Holmes County, Mississippi*, 432 F. 2d 910 (5th Cir. 1970); 11 Wright & Miller, *Federal Practice and Procedure* 104. Thus, the plaintiff will be required to remit the amount of $201,225.00.[16] Due to the nature and amount of this improper element of damages, evidence regarding it was not so prejudicial as to have infected the decision of the jury on the question of liability or the remainder of the damages. *Cf. Minneapolis, St. P. & S. Ste. M. Ry. v. Moquin*, 283 U. S. 520 (1931); *Ford Motor Co. v. Mahoney*, 205 F. 2d 267 (4th Cir. 1953).

III. Trial Errors.

Defendants finally contend that a new trial is warranted due to errors in the admission of certain evidence during the trial, the opening and closing arguments of counsel for plaintiff, and the charge to the jury. The thrust of the defendants' discussion of these alleged errors is that the evidence and argument presented by the plaintiff were not supported by a valid theory of liability under

15. The estimates were based upon the "times earnings" method and the section 1001 of the Internal Revenue Code method. Revised Exhibits P-12A and P-12B.

16. $67,075.00 trebled.

the antitrust laws. These arguments have been addressed at length in parts I and II above. The court has carefully considered the defendants' remaining contentions and concludes that there were no errors so prejudicial as to affect the substantial rights of the parties. *Fed. R. Civ. P.* 61.

Therefore, the defendants' motions for judgment notwithstanding the verdict or a new trial will be denied, conditioned upon the filing of a stipulation within twenty (20) days that $201,225 of the amount awarded under the verdict will be remitted by the plaintiff.

An appropriate order may be submitted.

MITCHELL H. COHEN
Mitchell H. Cohen, Senior Judge
United States District Court

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION
Appellants

(D. C. Civil No. 1077-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 9, 1977

Before GIBBONS, WEIS and GARTH, *Circuit Judges*

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OPINION OF THE COURT

(Filed November 14, 1977)

GIBBONS, *Circuit Judge*

This is an appeal from a final judgment of the District Court denying defendants' motions for judgment notwithstanding the verdict or for a new trial, after a jury verdict in favor of the plaintiff on its claim for money damages

under § 4 of the Clayton Act [1] for alleged violations of § 1 of the Sherman Act.[2]

The plaintiff, Martin B. Glauser Dodge Co. (hereinafter Glauser Dodge) is a family-owned New Jersey corporation which formerly operated a franchised Dodge automobile dealership in Vineland, Cumberland County, New Jersey. The defendants are Chrysler Corporation, three of its wholly owned subsidiaries—Chrysler Financial Corporation, Chrysler Realty Corporation, and Chrysler Motors Corporation—and Chrysler Credit Corporation, a wholly owned subsidiary of Chrysler Financial Corporation (hereinafter collectively Chrysler). Although separately incorporated, each of the defendant subsidiaries is part of an integrated Chrysler enterprise engaged in the manufacturing and marketing of automobiles, including, at the relevant time, Dodge automobiles.[3]

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1. 15 U. S. C. § 15 (1970):
Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

2. 15 U. S. C. § 1 (1970):
Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

In its complaint, plaintiff also alleged violations of the Robinson-Patman Act, 15 U. S. C. § 13(a) (1970), and of § 1 of the Sherman Act, 15 U. S. C. § 2 (1970). At the close of the evidence, however, these claims were dismissed.

3. Chrysler Motors Corporation engages in distribution, while Chrysler Financial Corporation provides capital for the entire Chrysler financial operation. Chrysler Realty acquires, develops, and administers property for Chrysler dealer sites. Chrysler Financial Corporation extends wholesale credit to and purchases retail installment contracts from Chrysler dealers.

This case requires that we explore once again the antitrust implications of competition between independently owned franchised retail dealers and franchised retail dealers established by the manufacturer under the well-known Dealer Enterprise (DE) program.[4] In denying defendants' motions, the District Court held that there was sufficient evidence to support the jury's verdict that the defendants' subsidizing of their partially owned dealers without providing similar assistance to independent dealers constituted an unreasonable restraint in violation of § 1 of the Sherman Act. We conclude that the Court erred in denying defendants' motion for judgment notwithstanding the verdict, and we reverse.

I

The Dealer Enterprise Program

Critical to the understanding of the antitrust issues presented by this case is an understanding of the emergence of the DE program in the automobile industry, for

4. Aspects of the automobile industry's DE program have been considered in other cases without definitive results. *See* Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338 (3d Cir. 1975), *vacating and remanding* 376 F. Supp. 546 (W. D. Pa. 1974); Rea v. Ford Motor Co., 497 F. 2d 577 (3d Cir. 1974), *reversing and remanding* 355 F. Supp. 842 (W. D. Pa. 1973); England v. Chrysler Corp., 493 F. 2d 269 (9th Cir.), *cert. denied*, 429 U. S. 869 (1974); Mt. Lebanon Motors, Inc. v. Chrysler Corp., 283 F. Supp. 453 (W. D. Pa. 1968). None of these cases sustained a judgment against a manufacturer because of the operation of the DE program. However, several cases recognized the possibility that in appropriate circumstances an independently owned dealer could recover for injury to his business or property caused by the competition of a DE dealer. *See, e.g.*, Coleman Motor Co. v. Chrysler Corp., *supra*, at 1343-48; Mt. Lebanon Motors, Inc. v. Chrysler Corp., *supra*, at 456-61. An appeal is pending in this court from an order granting defendants' motion for judgment notwithstanding the verdict in favor of the same defendants involved in the instant case. Elfman Motors, Inc. v. Chrysler Corp., No. 72-1282 (E. D. Pa. August 9, 1977).

without that understanding it is impossible to appreciate the operation of that program in what plaintiff contends is the relevant market at the relevant time. To a great extent the structure of automobile distribution is common economic knowledge and has been described in varying details in the cases referred to in note 3. The description which follows, however, is developed from the evidence in this case—in particular plaintiff's exhibits P-7 and P-8. Exhibit P-7 is a lengthy memorandum prepared in August of 1961 by E. C. Quinn, Sales Vice President of Chrysler, setting forth the reasons why Chrysler should embark on an expanded DE program. Exhibit P-8 is a letter dated April 12, 1962, from Mr. Quinn to all Chrysler Motors Corporation personnel on the subject "Sales and Marketing Representation Programs" outlining the deficiencies in Chrysler's distribution system and discussing remedies.

Automobile manufacturing, to state the obvious, is a capital intensive business in which investment in large manufacturing facilities achieves economics of scale and, if those facilities are utilized at or near capacity, lower unit costs and higher unit profits. Automobile retailing and servicing, on the other hand, requires wide dispersion of individual facilities, each typically requiring relatively low capital investment and, like many other retail businesses, operating on low unit profits but sometimes high returns on capital investment. But while capital investment in an individual automobile retailing establishment typically is small, the total capital investment in all such facilities is enormous. Historically, the automobile manufacturers have preferred to concentrate their investment in manufacturing facilities, leaving automobile retailing to private venture capital. This historical pattern, while offering the industry the advantage of being able to concentrate its resources in the manufacturing end, had the

disadvantage that those manufacturing resources could not be used to near capacity and hence could not be profitable, if private venture capital investment at the retail end, and thus sales, failed to increase in proportion to manufacturing capacity. That, unfortunately, is what occurred in the late 1950's. This pattern is reflected in the following table of Manufacturers' and Dealers' Net Worth at Year End, which appears in Exhibit P-7: [5]

	The Five Auto Manufacturers	*All Franchised New Car Dealers*
1954	$5.9	$4.4
1955	7.2	4.1
1956	7.5	4.3
1957	8.1	4.3
1958	8.2	4.4
1959	8.9	4.2
1960	9.7	3.9

The increase in manufacturers' net worth, in a period during which the investment in the separately owned retail industry on which utilization of manufacturing capacity depended was level or declining, created a serious problem for the whole industry. Between 1950 and 1962 the number of automobile dealers in this country declined from 47,000 to 32,000. *See* Exhibit P-8.

In part at least, the inability of the retail end of the business to keep old or attract new venture capital was the result of the same forces which have destroyed retail centers nationwide. With dispersion and suburbanization,

5. Automobile Manufacturers' Annual Report and National Association of Automobile Dealers' Association (numbers in billions of dollars).

the once familiar city "automobile row" became as anachronistic as the once familiar row of downtown department stores. At the same time, suburbanization created the need for new and different retail sales and service locations. And unlike soft goods retailing, in which some retailing giants had the capacity to move with the times, there were few giants among the automobile retailers. Undoubtedly the manufacturers contributed to the decline as well, by factors such as model proliferation, which tended to put pressure on already narrow retail mark-ups. But whatever the cause, the effect was clear—and serious.

In Chrysler's case the effect was deadly serious. As a result of recent investment in research, production and manufacturing facilities which Quinn estimated at over nine hundred million dollars, *see* Exhibit P-8, Chrysler in 1962 had a production capacity of 1.3 million cars a year, while its unit sales had declined from a 1955 high of 1,206,195 to 311,899 and from a high of 21.8% of industry sales in 1951 to about 11%. *See* Quinn Memorandum, Exhibit P-7. Quinn's memorandum discloses that as of June 30, 1961, Chrysler had about two thousand open retail points where retail dealers should be located but were not, including 753 open Dodge points. He estimated that the open points represented a loss of sales of 150,000 units a year. He also pointed out that many existing dealers were falling short of Chrysler's estimate of market potential for their point of sale and that this resulted in a sales shortfall of 310,000 units. Thus an inadequate retail dealer network produced a shortfall in sales of between 400 and 500 thousand units, which, as the decline in Chrysler's percentage of total industry sales showed,[6] had been di-

6. *See* Plaintiff's Exhibit P-6; Chrysler Corporation, Financial and General Fact Book, Chart on The Competitive History of the Automobile Industry as shown by New Passenger Car Registrations.

verted to its manufacturing competitors. Moreover, the percentage of Chrysler dealers who operated at a loss was substantially higher than for the automobile industry as a whole. Quinn's memorandum concluded that the profit record of automobile dealerships as a whole and of Chrysler dealers in particular would preclude resort solely to private venture capital in order to replace unsatisfactory dealers and that, to fill the essential new points then open, Chrysler would have to use its own resources.

Investment by automobile manufacturers in retail dealers was not in 1961, an unheard of phenomenon. This court accurately summarized the DE program in *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1341 (3rd Cir. 1975):

> Prior to 1954, Chrysler followed the conventional practice of marketing its automobiles through independent franchised dealers for resale to the public. In 1954, Chrysler began to franchise dealers as well under the Dealer Enterprise (D.E.) Plan. Under this plan, Chrysler supplied up to 70 percent of the capital needed to finance a new dealership. The plan, similar to those previously adopted by General Motors and Ford, provides that the 25 percent owner becomes president and general manager of the dealership and that he ultimately may purchase Chrysler's entire interest in the dealership out of his share of profits. Until such time, however, Chrysler retains majority control at the shareholder and board of directors levels.

In 1961, however, something more was needed. Quinn suggested certain refinements of the DE program, chief of which was the availability of an escrow fund as a method of accumulating out of profits to the credit of an

operator his 25% share of the investment. The DE program was not the only program under consideration, however. Quinn calculated that to fill in the two thousand open retail points and to replace or revitalize the dealerships which were falling short of sales potential for their points, Chrysler would in addition have to resort to a combination of steps, including the purchase and lease to dealers of retail facilities, the guarantee of dealer leaseholds, the provision of capital loans to dealers, and the absorption of the start-up expenses of new dealerships. He estimated that the total cost of repairing the two major deficiencies in the dealer organization—open points and lost sales dealers—would include capital costs of $122,600,000, expenses of $42,800,000, and contingent liabilities on lease guarantees of $118,500,000. He also recognized that an attempt to make such an investment quickly would be both wasteful and ineffective by reason of the control which the sales-ownership ratio (the ratio in which owners of one brand of car repurchase the same brand) exercises over the rate of volume increase. Thus he projected that a period of up to ten years would be required to accomplish the necessary restructuring of the Chrysler retail dealer network. He suggested proceeding in selected market areas with annual appropriations of $10,000,000 for capital expenditures, $4,000,000 for expense and $10,000,000 for contingent liability in the 1962, 1963, and 1964 model years.

Quinn's suggested program was adopted by Chrysler. However, Exhibits P-7 and P-8 make clear that Chrysler's first choice remained resort to retailers owned by private venturers, with the Quinn program operating only as a supplement.[7]

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7. That the expanded DE program was intended only as a temporary, supplemental program is evidenced most by statements by Quinn himself in Plaintiff's Exhibit P-7:

II

Glauser Dodge: History and Competition From DE Dealers

Glauser Dodge opened a private venture capital Dodge dealership in Vineland, New Jersey, in 1964. The dealership was conducted by Martin B. Glauser and his three sons. It was originally programmed by Chrysler to sell approximately 111 new vehicles per year. However, Glauser Dodge quickly exceeded that sales goal by more than 200%, becoming the largest private venture capital Dodge dealer in Southern New Jersey. It expanded its operations from one to three facilities in Vineland, acquired a five-acre tract of land for a new consolidated facility, and in December of 1968 began construction of that new facility. The new facility cost $315,000, of which $260,000 was provided by a bank loan. Glauser Dodge contends, and Chrysler disputes, that Glauser Dodge's operations were both high volume and profitable until 1969.

In 1964, when Glauser Dodge commenced business, Chrysler had already embarked on the process of filling in points in Southern New Jersey pursuant to the Quinn program. One DE dealership, Crescent Dodge, was already in operation at Collingswood, Camden County, New Jersey, more than 35 miles from Vineland. In 1965 a second DE dealership, Cherry Hill Dodge, was established at Cherry Hill, Camden County, New Jersey, about 35 miles from Vineland. Martin Glauser became the DE manager of Cherry Hill Dodge, while his sons continued to manage Glauser Dodge. After Martin Glauser's death in 1966,

7. (Cont'd.)
In all instances in which Chrysler invests its capital the goal is the ultimate buyout of that dealership by the dealer operator and his eventual owning it in total.
Chrysler Motors Corporation has no desire to be in the automobile retail business.

another DE manager was substituted at Cherry Hill. The new manager completed a buyout of Chrysler's interest in January, 1972. In 1967 Chrysler opened two additional DE dealerships—Cinnaminson Dodge at Cinnaminson, Burlington County, New Jersey, approximately 45 miles from Vineland, and Black Horse Dodge at Mt. Ephraim, Camden County, New Jersey, 31 miles from Vineland. Also in 1967 Chrysler closed out Crescent Dodge at Collingswood, which in the four years of its operations had never achieved a net profit. The DE manager at Cinnaminson bought out Chrysler's interest on June 1, 1970. Black Horse Dodge was purchased by its manager in 1974, after the verdict in this action. Thus, at the time of trial in the District Court, of the four DE dealerships which could have had an impact on Glauser Dodge's business or property, one had been closed, two had, pursuant to a DE purchase contract, been converted to private dealerships, and the fourth was operated by a manager who held a DE purchase contract.

In September, 1969, with its new facility ready for a grand opening, Glauser Dodge was experiencing cash flow problems. Chrysler Realty declined to act on a possible purchase and lease-back of the new facility. Chrysler Credit, which financed automobile loans for Glauser Dodge on a recourse basis, increased its repossession rate on defaulted retail paper at about that time and demanded repurchase, thus further aggravating Glauser Dodge's cash flow problems. In March, 1970, three Glauser Dodge checks were returned for insufficient funds and an inventory check by Chrysler Credit showed that Glauser Dodge had sold cars on which a floor plan inventory loan was outstanding without accounting for the proceeds of sale. It was, in the parlance of the industry, out of trust. Although Glauser Dodge contended that various Chrysler

subsidiaries owed it approximately the amount which it owed to Chrysler Credit, Glauser assigned to Chrysler Credit a mortgage on the new facility and turned over as additional security titles to previously unencumbered cars. It also obtained a $60,000 bank loan, out of which it made payments to creditors. Finally, it endeavored to obtain from Chrysler a guarantee of a proposed lease if outside investors would buy the facility and lease it back to Glauser. Chrysler declined to guarantee the lease because the rental was in its view too high for the planning potential for Vineland. The cash flow difficulties continued and, in July, 1970, Chrysler Credit repossessed Glauser Dodge's entire automobile inventory. Chrysler Credit then disposed of both the new and used car inventories at a loss. Hence, Glauser Dodge was out of business on July 31, 1970.

III

Glauser Dodge's Antitrust Action

Glauser Dodge commenced this action in August, 1970, charging Chrysler with violations of the Robinson-Patman Act [8] and Sections 1 and 2 of the Sherman Act [9] in the operation of the DE program, which, it alleged, discriminated against private venture capital dealers. Chrysler answered and Chrysler Credit Corporation filed a counterclaim for the balance due it. Chrysler Credit Corporation moved for summary judgment on the counterclaim and obtained a judgment of $205,719.12, which was affirmed by judgment order on May 16, 1973.[10] The case went to trial on Glauser Dodge's antitrust claims on Feb-

8. 15 U. S. C. § 13 (1970).

9. 15 U. S. C. § 1 and 2 (1970).

10. Martin B. Glauser Co. v. Chrysler Corp., 478 F. 2d 1399 (3d Cir. 1973).

ruary 14, 1974. Throughout the trial, Glauser Dodge pressed the Robinson-Patman Act and the Sherman Act § 2 attempt to monopolize claims. At the end of the entire case, however, it abandoned these legal theories with prejudice, and the case was submitted to the jury solely under Section 1 of the Sherman Act.

Glauser Dodge's Section 1 theory, which was accepted by the District Court in its charge to the jury, was that several Chrysler corporate enterprises conspired with each other to restrain trade in relevant product and geographic markets [11] and that the restraints injured Glauser Dodge in its business or property. The crux of Glauser Dodge's antitrust claim is that it was unable successfully to compete because the DE dealers received benefits from Chrysler which were not available to Glauser. The District Court's charge to the jury outlined Glauser Dodge's claims: [12]

> (P)laintiff . . . complains that the Chrysler defendants combined or conspired in restraint of trade or commerce by adopting and pursuing the following course of conduct:
>
> A. The creation and maintenance of better financed dealer enterprise dealerships for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss;
>
> B. Permitting DE dealers or factory stores to operate regularly in an out of trust condition and not so with Glauser;

11. The relevant product market alleged by Glauser Dodge to be affected by the conspiracy consisted of the wholesale and retail markets for Dodge automobiles. The relevant geographic market consisted of counties in Southern New Jersey and in the Philadelphia area.

12. Since counsel for Glauser Dodge explicitly approved the District Court's charge to the jury, we are justified in quoting that charge as a summary of plaintiff's antitrust theory.

C. Advertising and selling cars through factory controlled outlets or DE dealers at prices which were lower than independent retail dealers, such as the plaintiff, could afford to charge.

D. Requiring private capital dealers, such as the plaintiff, to guarantee retail commercial paper while permitting competing DE dealers to sell such paper to Chrysler Credit without recourse;

E. Refusing to deliver when properly ordered new vehicles to the plaintiff in time for its opening, even though an ample number of such vehicles were delivered to the DE dealers with whom the plaintiff competed;

F. Effectively limiting by the use of recourse retail paper and other restrictions upon the plaintiff's credit the plaintiff's ability to participate in contests and specials on the same basis as competing DE dealers; and

G. Providing superior physical facilities to DE dealers on terms which were not available to the competing private capital dealers such as the plaintiff Glauser.

The evidence offered in support of Glauser Dodge's Section 1 theory of recovery was in some respects undisputed and in other respects hotly contested.

There is no serious dispute over the fact that the four DE dealers in Southern New Jersey received financing from Chrysler which the plaintiff did not receive. Chrysler Realty acquired facilities for these dealers and leased them on terms which were not offered to Glauser Dodge and which the jury could have found were unavailable to

the latter from private real estate developers. Chrysler Credit Corporation purchased retail installment sales contracts from DE dealers on a without recourse basis, while its arrangement for purchases of such paper from Glauser Dodge required repurchase of defaulted installment contracts. As contemplated by the Quinn program, Chrysler absorbed some of the annual losses involved in the start-up of DE dealers, but did not do so for Glauser Dodge. Chrysler Credit permitted some DE dealers to operate in an out of trust condition when they were experiencing cash flow problems, but declined to extend this accommodation to Glauser Dodge when it went out of trust. Each of these activities, which amounted to a Chrysler capital investment or expense at a DE retail point, was contemplated by the Quinn program, which also contemplated, whenever possible, reliance on private venture capital dealers such as Glauser Dodge.

Aside from these largely undisputed matters, Glauser Dodge produced evidence tending to show that DE dealers sometimes advertised for sale and sold cars at prices which were lower than private venture capital dealers, such as the plaintiff, could afford to charge. Chrysler denied that this was a regular practice and produced evidence that it took steps to halt low-price advertising by Cherry Hill Dodge, the dealer on which most of the plaintiff's price evidence centered. Also contested was Glauser Dodge's contention that for the 1969 Announcement Day, when new models were introduced, the DE dealers received many new cars while it received few. Looking at the contested evidence in the light most favorable to the plaintiff, the jury could have found that the DE dealers did subject private dealers to intense price competition and that the DE dealers obtained better deliveries for the 1969 Announcement Day.

After outlining Glauser Dodge's contentions as to the objects of the conspiracy,[13] the District Court submitted four interrogatories to the jury:

> 1. Did any of the defendants enter into any combination or conspiracy in unreasonable restraint of trade or commerce?
>
> Answer yes or no.
>
> 2. If your answer to Question 1 is yes, then which defendants did combine or conspire. . . .
>
> 3. If your answer to Question 1 is yes, then was the plaintiff Glauser Dodge injured as a proximate result of such a combination or conspiracy.
>
> Answer yes or no.
>
> 4. If your answer to Questions 1 and 3 are yes, state the amount of damages. . . .[14]

The Court's charge permitted the jury to answer question 1 affirmatively if it accepted one of the seven Glauser Dodge theories outlined above. The charge permitted the jury to answer question 3 affirmatively if it found

> that plaintiff measurably competed with Dodge DE dealers in selling new Dodge vehicles in a relevant market and that Glauser was injured as a proximate result thereof. . . .[15]

13. *See* pp. 11-12 *supra*.

14. Joint Appendix to Parties' Briefs, Vol. II, at p. 03339.

15. *See* Joint Appendix for Parties' Briefs, Vol. II, at p. 03357. In the Court's charge, measurable competition in a relevant geographic market was defined thus:

> If you find that the plaintiff had the capacity and the knowhow to compete with the defendant's DE dealers for sales and in fact advertised and attempted to gain measurable sales in any of the market areas in which any of the Dodge DE dealers made measurable sales, you may find that the plaintiff was in competition with such a store or stores. Also, if you find that any of the Dodge DE dealers made or through advertising or otherwise attempted to make measurable sales in areas in which the plaintiff made or attempted to make measurable sales, you should find that there was competition.

Joint Appendix, *supra*, at p. 03354. Later in the charge, the Court stated that:

> (t)he test is simply whether the combination affects a definable market and whether it restrains an appreciable part of the trade in that market. The geographic area selected must, therefore, correspond to the commercial realities of the industry and be significant in an economic sense.

Joint Appendix, *supra*, at p. 03356.

The existence of a relevant product market was to be determined by the jury under this charge:

> A manufacturer's product may constitute a relevant product market if competition has developed around it as a separate economic entity recognized by the manufacturers, by the competitors, and by consumer purchasers.
>
> • • •
>
> In this case the plaintiff claims that there is a separate wholesale market for new Dodge automobiles, that dealers who purchase Dodges for resale are not really free to substitute automobiles of another manufacturer if they find themselves in difficulty with Dodge, and that there is also a definable sub-market consisting of present Dodge owners for the retail sale of Dodge automobiles.
>
> The defendant, on the other hand, claims the only relevant product market is the market shared by all new automobiles and that competition in such a market could not be adversely affected by the acts complained of.
>
> Therefore, in considering this case, one of the issues which you must decide is whether there is a separate market for the wholesale or retail sale of new Dodge automobiles in Southern New Jersey or Philadelphia which could have been adversely affected by the combination or conspiracy complained of.

Joint Appendix, *supra*, at pp. 03355-57.

The jury answered these interrogatories affirmatively and returned a verdict against the defendants, finding that they had entered into a conspiracy in unreasonable restraint of trade. Damages were assessed at $1,300,000, which amount was trebled to $3,900,000. The defendants filed timely motions for judgment notwithstanding the verdict and for a new trial. On August 20, 1976, the District Judge filed an opinion stating that he would deny

these motions if plaintiff would correct an error of $67,075 in the damage assessment by filing a remittitur of $201,225. Glauser Dodge filed the remittitur and the District Court denied defendants' post-trial motions. This appeal followed.

IV

Legal Analysis of Sherman Act § 1 Claim.

In order to sustain a cause of action under § 1 of the Sherman Act, the plaintiff must prove: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse, anti-competitive effects within relevant product and geographic markets; (3) that the objects of and the conduct pursuant to that contract or conspiracy were illegal; and (4) that the plaintiff was injured as a proximate result of that conspiracy. Because we conclude that the defendants' activities were not illegal under § 1 of the Sherman Act—i.e. they did not constitute an unreasonable restraint—we need not decide the first, second, and fourth issues outlined above. For purposes of our analysis of the legality of the defendants' behavior, then, we will assume that the defendants combined or conspired with each other [16] and that the jury properly identified relevant product [17] and geographic [18] markets.

16. Chrysler argues that we should hold that a corporation cannot conspire with its vertically aligned subsidiaries since such a conspiracy introduces no new factor into the competitive situation. Chrysler concedes, however, that its position is foreclosed by this court's holdings in Cromar Co. v. Nuclear Materials & Equip. Corp., 543 F. 2d 501, 511-12 (3d Cir. 1976), and in Coleman Motor v. Chrysler Corp., 525 F. 2d 1338 (3d Cir. 1975). Adopting Chrysler's view would require reconsideration of those authorities by the court in banc.

17. Glauser Dodge argues that because of the importance of maintaining intrabrand competition, see Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1347 (3d Cir. 1975), this court should recognize a *wholesale* Dodge market as the relevant product market. Glauser argues that since Dodge dealers buy only Dodge vehicles from the manufacturer, there is a total lack of cross-elasticity of demand at the wholesale level. In addition, Glauser argues that due to monetary investments and goodwill, the dealers themselves cannot easily switch to another brand of automobiles for distribution. Finally, Glauser emphasizes that Chrysler Credit was the only entity to which it could sell substantial amounts of retail paper, thereby strengthening its ties to Chrysler. Without expressing an opinion on the merits of this argument, we point out that a similar argument was accepted by the district court in Joe Westbrook, Inc. v. Chrysler Corp., 429 F. Supp. 824 (N. D. Ga. 1976).

Glauser Dodge also argues that this court should recognize a relevant retail market limited to new Dodge vehicles. In support of this argument, Glauser relies on testimony with regard to Dodge's conquest and loyalty rates. *See* Joint Appendix to Parties' Briefs, at pp. 2132-36 (50% of new car buyers purchase the same make car as that which they previously owned).

Chrysler argues that the individual Dodge brand of automobiles cannot constitute a separate product market for purposes of a § 1 inquiry. Chrysler relies primarily on Mogul v. General Motors Corp., 391 F. Supp. 1305 (E. D. Pa. 1975), *aff'd*, 527 F. 2d 645 (3d Cir. 1976), and Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1349 (3d Cir. 1975). Those cases did not decide this issue, however, since the passages referred to dealt not with § 1 cases, but with § 2 attempt to monopolize cases. As noted above, we find it unnecessary here to resolve the product market issue within the context of § 1 of the Sherman Act.

18. The determination of a relevant geographic market is normally a question of fact for the jury. *See* Acme Precision Products, Inc. v. American Alloys Corp., 189 F. Supp. 153, 192 (S. D. N. Y. 1960).

19. The standard for reviewing a denial of a motion for judgment notwithstanding the verdict is whether, considering the evidence in the light most favorable to the party against whom the motion was made, there is sufficient evidence to support the jury verdict. *See* Coleman Motor Co. v. Chrysler Corp., 525 F. 2d 1338, 1344 (3d Cir. 1975); Andrews v. Dravo Corp., 406 F. 2d 785, 789 (3d Cir. 1969).

Reasonableness of the Restraint Under § 1 of the Sherman Act [19]

Unless the particular restraint falls within a category that has been judicially determined to be illegal per se,

the legality of a restraint challenged under § 1 of the Sherman Act must be assessed under the rule of reason. *See United States v. Standard Oil Co.*, 221 U. S. 1, 60 (1911); *Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1344 (3d Cir. 1975); *Mt. Lebanon Motors, Inc. v. Chrysler Corp.*, 283 F. Supp. 453, 456 (W. D. Pa. 1968), *aff'd on other grounds*, 417 F. 2d 622 (3d Cir. 1969). The rule of reason standard is equally applicable to restraints affecting intrabrand competition, such as that alleged here, as it is to restraints affecting interbrand competition. *See Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338, 1344, 1346 (3d Cir. 1975).[20] Under the rule of reason standard, only those restraints upon interstate commerce which are unreasonable are proscribed by Section 1 of the Sherman Act. In *Chicago Bd. of Trade v. United States*, 246 U. S. 231, 238 (1918), Justice Brandeis' opinion for the Court outlined the analysis which must be undertaken in order to determine whether a particular restraint is unreasonable and therefore unlawful:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

20. Chrysler argues that the Supreme Court's recent decision in Continental T. V., Inc. v. GTE Sylvania, Inc., 45 U. S. L. W. 4828 (U. S. June 23, 1977), altered the weights to be given to interbrand and intrabrand competition within the rule of reason test and, consequently, that *Sylvania* mandates the entry of a judgment notwithstanding the verdict in the instant case. We do not agree that judgment n.o.v. is appropriate on that ground. By overruling United States v. Arnold Schwinn & Co., 388 U. S. 365 (1967), the *Sylvania* decision eliminated a formalistic distinction under which certain territorial restrictions in the vertical distribution of the product were analyzed under the rule of reason standard, while others were labelled per se violations of § 1. *Sylvania* held that all such vertical territorial restrictions would be evaluated under the reasonableness inquiry. The Court's discussion of the significance of intrabrand and interbrand competition was intended merely to illustrate the error of *Schwinn's* formalistic distinction. It was not intended to affect the analysis under the rule of reason test.

For purposes of our analysis here, the critical part of Justice Brandeis' opinion is its discussion of the role that the defendant's *intent or purpose* plays in the rule of reason test. The ultimate test of legality, of course, is whether the particular restraint promotes or impairs competition. But, as Justice Brandeis' opinion recognized, the intent or purpose underlying the restraint is a crucial variable in aiding the court to assess the competitive effects of the restraint.

Two prior decisions of this Circuit—*Coleman Motor Co. v. Chrysler Corp.*, 525 F. 2d 1338 (3d Cir. 1975), and *Rea v. Ford Motor Co.*, 497 F. 2d 577 (3d Cir. 1975)—considered the DE programs in automobile distribution.

In *Rea*, a privately capitalized Ford dealer sued Ford Motor Company (the manufacturer) charging that Ford's subsidization of its wholly-owned dealerships constituted an unreasonable restraint of trade in violation of Section 1

of the Sherman Act.[21] The plaintiff introduced expert testimony that calculated plaintiff's damages as equal to the average subsidy per car provided to the Ford-owned dealerships times the number of cars sold by the plaintiff. In rejecting this theory, we held that the mere proof of a subsidy from the manufacturer to DE dealerships for the purpose of increasing market penetration did not establish a recoverable injury to a competing dealer under § 4 of the Clayton Act. 479 F. 2d at 587-70. The *Rea* case did not rule out the possibility that a manufacturer could be liable for antitrust violations committed in their operation of retail outlets. *Id.* at 590. However, since the plaintiff there had not suffered an injury recoverable under the antitrust laws, the *Rea* court found it unnecessary to consider the legality of the manufacturer's distribution system under § 1 of the Sherman Act.[22]

This Court in *Coleman* considered the same DE program, albeit in a different geographic market, as that presented in the instant case. In that case, the plaintiff averred that Chrysler's activities were "*intended* to achieve a Dodge sales structure composed primarily or entirely of several large Chrysler-owned dealerships." [23] Reviewing the evidence for possible jury findings, we concluded that "the jury could have concluded that Chrysler had accomplished its purposes of increasing Dodge sales and con-

21. Plaintiff's suit in *Rea* was not based solely on Section 1 of the Sherman Act. On the contrary, plaintiff also alleged violations of the Robinson-Patman Act, Section 3 of the Clayton Act (15 U. S. C. § 1221 et seq.), and the common law of contracts.

22. The opinion in *Rea* stated explicitly that it was not deciding the question whether the manufacturer's activities violated § 1 of the Sherman Act:

> Ford has advanced a number of arguments why the verdict against it on this claim is erroneous and should be set aside. However, it is necessary for us to consider only one which we find meritorious and dispositive of this claim.

497 F. 2d at 589.

23. 525 F. 2d at 1343.

solidating retail sales in the hands of several strong Chrysler-controlled dealerships." [24] Since it found trial errors, the Court remanded the case for a new trial.

The opinion in *Coleman* suggests for present purposes the parameters of lawful activity under Section 1 of the Sherman Act. More specifically, although the *Coleman* Court acknowledged that the ultimate concern of the Sherman Act is with effects, not intent,[25] the opinion also relied, in large part, upon the purpose the jury could have found to underlie the DE program in the relevant market as a tool for gauging the competitive effects of that program within that market. Thus, *Coleman* teaches us that predatory activities which have the purpose of consolidating sales of a manufacturer's products in its wholly or partially owned dealerships may produce anti-competitive effects violative of the Sherman Act. In recognizing that restraints on intrabrand competition are cognizable under Section 1 of the Sherman Act, *Coleman* reasoned that forward vertical integration in the automobile distribution system could eliminate competition among dealers of the same brand within a $200-300 per vehicle price jurisdiction, which arises because non-price factors enter into consumers' decisions to purchase automobiles. In addition, the court stated that vertical integration could adversely affect competition among dealers with regard to repair services.[26] In an oligopolistic industry such as automobile manufacturing, intrabrand competition among dealers of a single brand may be highly significant to the consumer.[27] Thus, restraints designed to achieve forward

24. *Id.* at 1346.

25. *Id.* at 1345 n. 10.

26. *Id.* at 1347.

27. *See* Note, *Vertical Integration as a Restraint on Intrabrand Competition: The Automobile Industry,* 17 B. C. Indus. & Com. L. R. 871, 875-79 (1976).

vertical integration may be found to be unreasonable. But in the absence of either a purpose to integrate vertically or such an operative effect, steps taken by a car manufacturer to enhance its market penetration against its manufacturing competitors can only enhance interbrand competition and must be deemed to be lawful. In addition, where the manufacturer's intent is not to maintain ownership of the dealer, but to sell its interest to the private manager, the eventual effect is an increase in the number of private dealers of that automobile brand and thus an enhancement of intrabrand competition. The rejection in *Coleman* of Chrysler's contention that it was entitled to a judgment n.o.v. rather than a new trial is no more than a holding that on the record in that case a jury could have found a purpose or operative effect of forward vertical integration by the elimination of independent dealers in the geographic and product market there considered.

This interpretation of *Coleman* is consistent with the Ninth Circuit's opinion in *England v. Chrysler Corp.*, 493 F. 2d 269 (9th Cir. 1974). That case also involved a challenge to Chrysler's DE program based on § 1 of the Sherman Act. In affirming the district court's granting of a judgment notwithstanding the verdict in favor of the defendant, the Ninth Circuit court stated that in order to prevail, the plaintiff must prove that the defendant's "conduct was deliberate." 493 F. 2d at 273. The Court elaborated:

> To be deliberate does not mean there must be specific intent to produce the unreasonable economic effect (e.g., to "squeeze" Sunset). It means that there must be evidence from which it may at least be inferred that the conspirator determined upon the *course* of conduct, as opposed to the result.

> In this context, Chrysler's conduct would be deliberate if it could be inferred that Chrysler determined to manage Van Ness regardless of retail profit.

Id. (emphasis in the original). As this language suggests, intent or deliberateness can be proved by showing that the defendant has determined upon a course of conduct which in turn is likely to have anti-competitive effects.[28]

Having discussed what we consider to be the controlling precedent in this area, we turn now to an assessment of the circumstances of the present case. Although the first of the seven objects of the defendants' conspiracy listed in the charge referred to financing DE dealers "for the purpose of penetrating the automobile market in which DE dealers competed with the plaintiff to its loss", *see* p. A46 *supra*, the court's instruction did not require that the jury find that Chrysler had the purpose or its programs the actual effect either of concentrating sales of Dodge products in the hands of Chrysler-controlled dealerships or of limiting in any way the role of private venture capital dealerships in the distribution of Chrysler products. It is understandable that no such charge was given, for there is no evidence tending to support such a conclusion. The undisputed evidence is to the effect that each of the four DE dealerships was intended by Chrysler to become a private capital dealerships through the normal operation of the contracts with DE managers. Nor can it be inferred from the record in this case that Chrysler operated the DE dealers in disregard of retail profit. During the period when the Quinn program was in operation, Chrysler franchised Glauser Dodge as a new private venture capital dealer. Of the four DE dealerships complained of, one

28. This interpretation of *Coleman* and *England* has recently been accepted by the district court in Elfman Motors, Inc. v. Chrysler Corp., No. 72-1282 (E. D. Pa. August 9, 1977).

was teminated when it failed to achieve profitability, two had been converted to private ownership at the time of trial, and the fourth was subject to a contract providing for such conversion.[29] Finally there is no evidence from which the jury could have found thta Glauser Dodge was a lost sales dealership which under the Quinn program was slated for replacement. The record requires the conclusion that the dealer support program outlined in Exhibits P-7 and P-8 was intended by Chrysler as a temporary and supplemental means of bolstering a defective private dealer network and not as a means for forward vertical integration into automobile distribution.[30] Thus, the potential for anti-competitive effects which we found to be significant in *Coleman* is absent here. Accordingly, *Coleman* does not compel a judgment for the plaintiff in this case.

Since *Coleman* does not control the outcome in this case, we must confront the more expansive theory advocated vigorously by Glauser Dodge. Under that theory, whenever a manufacturer subsidizes retail dealers in order to maximize its manufacturing profits by increasing its market penetration, there is an anti-competitive injury to any dealers who compete with the subsidized dealers. Glauser Dodge's counsel explained the full thrust of its theory when at oral argument on this appeal he explained:

> I think that a General Motors dealer could have complained about it. I think a Ford dealer could have

29. As stated earlier, *see* p. A44 *supra*, the fourth DE dealer—Black Horse Dodge—was purchased by its manager in 1974, after the trial verdict in this case.

30. The only evidence that even remotely supports a *Coleman* violation is the hotly disputed evidence with regard to the deliveries for the 1969 opening. In light of the overwhelming evidence that the purpose and actual operation of the DE program was not to integrate vertically, this single, contradicted piece of evidence is simply not sufficient to support the jury's verdict.

> complained about it. Anybody who had to compete in this market with the type of conduct that was involved here would have a complaint under the antitrust laws.[31]

To the extent that Glauser Dodge claims an injury based solely on the loss subsidy theory, its claim is clearly foreclosed by our decision in *Rea v. Ford Motor Co.*, 497 F. 2d 577, 590 (3d Cir. 1974). However, to the extent that Glauser Dodge claims an injury other than loss subsidies, we are compelled to address the question left unanswered by this court in *Rea*—i.e. whether a manufacturer's subsidization of its partially or wholly owned dealerships for the purpose achieving market penetration violates Section 1.

In this case, the evidence was that the subsidy took the form of capital investments, absorption of start-up expenses, and favorable credit arrangements. But plaintiff's theory of injury to competition would be equally applicable to any form of subsidy. Moreover, the effect on competition would be the same if the subsidies of which Glauser Dodge complaints came from a source other than Chrysler. For example, if, instead of Chrysler's investments, the four DE dealers had obtained more favorable lines of credit with banks and higher private venture capital investment, their ability to subject the plaintiff to intense price competition would be the same. Elimination of such competition cannot be the object of Section 1 of the Sherman Act. *Cf. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 97 S. Ct. 690, 45 U. S. L. W. 4138 (U. S. Jan.

31. Transcript of Oral Argument, Glauser Dodge Co. v. Chrysler Corp., September 9, 1977, at p. 32.

It should also be noted that this theory is not consistent with the premise that the relevant product market should be restricted to Dodge dealers.

25, 1977). Yet all that distinguishes the instant case from that of the hypothetical better-financed private dealer is the source of the financing and the motive-market penetration—of the financing manufacturer. The fact that the source of the subsidy is the manufacturer itself, we conclude, does not under a rule of reason analysis of the facts, bring this case within the reach of Section 1 of the Sherman Act. The object of the antitrust laws is the enhancement of competition, while in essence Glauser Dodge argues that it is entitled to be insulated from competition encouraged by a manufacturer. Absent forward vertical integration whose purpose or actual operation is to concentrate Dodge sales in the hands of the Chrysler-owned dealers, the subsidies have a pro-competitive effect, at both the intrabrand and the interbrand levels. Accordingly, the motion for judgment notwithstanding the verdict should have been granted.

The judgment appealed from will be reversed.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Appellants

(D. C. Civil No. 1077-70)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS, WEIS and GARTH, *Circuit Judges*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on September 9, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court, entered September 8, 1976 and January 7, 1977, be, and the same are hereby reversed. Costs are taxed against appellee.

ATTEST:

THOMAS F. QUINN
Clerk

November 14, 1977

Certified as a true copy and issued in lieu of a formal mandate on December 22, 1977.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellants as follows:

Brief & Supp. Appx.	$ 4,291.02
Appendix	5,860.99
Supp. Brief	524.76
Reply Brief	904.40
Clerk's Fees	100.00
TOTAL	$11,681.17

APPENDIX D.

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 76-2390 and 77-1188

MARTIN B. GLAUSER DODGE CO.,
Appellee

v.

CHRYSLER CORPORATION
CHRYSLER MOTORS CORPORATION
CHRYSLER FINANCIAL CORPORATION
CHRYSLER CREDIT CORPORATION
CHRYSLER REALTY CORPORATION,
Appellants

(D. C. Civil No. 1077-70)

SUR PETITION FOR REHEARING.

Present: SEITZ, *Chief Judge*, ADAMS, GIBBONS, ROSENN, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges*

The petition for rehearing filed by MARTIN B. GLAUSER DODGE CO. in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of

the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

JOHN J. GIBBONS
Judge

Dated: December 14, 1977